DAMIEN THAMAN DIVEAN (MEWAKILI PERTUBUHAN PELINDUNG KHAZANAH ALAM) & ANOR v. MAJLIS EKSEKUTIF NEGERI SELANGOR DARUL EHSAN (EXCO) & ORS

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
AZIMAH OMAR JCA
WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: B-01(IM)-870-12-2022]
30 APRIL 2025

Abstract – *(i) In a public interest litigation case concerning environmental conservation, non-governmental organisations (NGOs) and nature conservationists can be deemed to have the necessary locus standi to file for judicial review, provided they demonstrate a real and genuine interest in the subject matter; (ii) A statutory amendment that introduces a new procedural requirement does not apply retrospectively to a decision made before the amendment came into force, even if the notification of that decision is published after the amendment. The relevant date is the date the decision was made, not the date of its subsequent Gazette notification; (iii) The courts will not interfere with or question a policy decision of the State as it falls within the purview of the Executive's policy-making authority. The court's role is not to decide on the merits of such policy matters.*

ADMINISTRATIVE LAW: *Judicial review – Appeal – Challenge against decision of State Executive Council – State Executive Council degazetted part of forest reserve – Whether applicants had necessary locus standi to mount up challenge against decision – Whether statutory amendment that introduces new procedural requirement applies retrospectively – Whether policy decision of State amenable to judicial review – Whether application for judicial review time-barred*

On 20 November 2000, the State Executive Council ('MKN') had made a decision to degazette part of the Bukit Cherakah Forest Reserve as a permanent reserve forest, to be alienated to nine companies including: (i) Perbadanan Kemajuan Negeri Selangor; (ii) SAS Estate Sdn Bhd ('SAS Estate'); (iii) Excel Nobel Construction Sdn Bhd ('Excel Nobel'); (iv) Permaddun Sdn Bhd ('Permaddun'); and (v) Restu Mantap Sdn Bhd ('seventh respondent'). 150 acres of land alienated to SAS Estate, Excel Nobel and Permaddun had been fully developed into a housing area. The alienation of 50 acres of land in Bukit Cherakah Forest Reserve to the seventh respondent was carried out for the purpose of development of residential and commercial buildings. For these purposes, 279 land titles were issued to the

seventh respondent. On 29 April 2011, the National Forestry Act (Adoption) (Amendment) Enactment 2011 introduced the requirement to hold a public inquiry into the degazettement process. The sixth respondent was the legal and beneficial owner of 133 hectares of land which was alienated by the State in December 2016 for development of residential and commercial purposes. In May 2022, a *Gazette* notification was issued pursuant to s. 13 of the National Forestry Act 1984, notifying the public of the decision by the State Government to excise the Forest Reserve of Bukit Cherakah made in 2000. Hence, the appellants filed a judicial review application in the High Court, seeking: (i) to quash the *Gazette* notification dated 14 April 2022 ('prayer (a)'); (ii) to quash the decision of MKN dated 20 November 2000 to degazette the Bukit Cherakah Forest Reserve ('prayer (b)'); and (iii) a declaration that the requirement for a public inquiry, as stipulated in the National Forestry Act (Adoption) (Amendment) Enactment 2011 must be complied with by the respondents as a prerequisite before the degazettement of any land could be allowed in the State of Selangor ('prayer (c)'). It was argued by the appellants that: (i) the decision of the respondents was procedurally improper as there was no public inquiry prior to the publication of the *Gazette*, as required under s. 11 of the National Forestry Act (Adoption) Enactment 1985 (Selangor) (EN 5/1985) ('NFA 1985'); (ii) the decision was illegal and *ultra vires* as MKN lacked the legal authority to backdate the degazettement of forest reserves, making the decision unlawful; (iii) MKN's decision to backdate the *Gazette* was made with the specific purpose of rectifying the fact that forest reserve land had been given away for development while Bukit Cherakah was still a forest reserve. Hence, this retrospective action was improper and illegal; and (iv) the degazettement deprived the appellants of the benefit of the forest reserve, which they had been permitted to enjoy. The High Court dismissed the leave application on the grounds that, *inter alia*, the appellants lacked *locus standi* as they were not adversely affected by the decision of the MKN to degazette the Bukit Cherakah Forest Reserve. Hence, this appeal.

Held (dismissing appeal)
Per Azizah Nawawi JCA (for the majority):

(1) The first appellant was the legal officer for Pertubuhan Pelindung Khazanah Alam ('PEKA'), established in 2010. PEKA aimed to protect ancient rainforests and biodiversity. The second appellant was the legal officer for Persatuan Rimba Komuniti Shah Alam that was officially formed in March 2016 to save and officially protect this forest. Since this appeal constituted a public interest litigation and the appellants acted in the public interest as nature conservationists, the appellants had a real and genuine interest in protecting the Bukit Cherakah Forest Reserve. As such, the appellants had the necessary *locus standi* to file the judicial review application. (paras 2, 24, 25 & 31)

(2a) The main complaint of the appellants was against the decision of MKN to excise land from the permanent forest reserve. This decision had already been made on 20 November 2000. Arising from this decision, the land reverted back to the State and the State had, thereafter, alienated the said land to the parties concerned, including the sixth and seventh respondents. Therefore, the *Gazette* notification dated 5 May 2022 was not a decision to degazette part of the forest reserve. It was merely a notification that a decision to degazette was made by MKN and that the decision was made on 20 November 2000 and took effect from that date. (para 45)

(2b) The decision to degazette part of the forest reserve was a policy decision by the State. This could be seen from the purpose of the alienation of the land, which was for 'tujuan pembangunan' or development of residential buildings and commercial buildings. It was a policy decision of the State, whether to maintain the said land as forest reserve or to develop the same for the community. It was not within the purview of the courts to decide on policy matters. When the decision to excise part of the forest reserve was made by MKN in 2000, there was no requirement for a public inquiry as the amendment only took effect on 19 May 2011. (paras 45 & 46)

(3) The High Court Judge did not err in law in dismissing the leave application with regards to prayer (b). The impugned decision was made in 2000 and this application was filed more than 20 years later. Such an application failed to comply with O. 53 r. 3(6) of the Rules of Court 2012 ('ROC'), which provides that an application for leave shall be filed promptly and within three months from the date when the grounds of application first arose or when the decision was first communicated to the appellant. (paras 32 & 33)

(4) Section 11 of the NFA 1985 was enacted pursuant to the 'Enakmen (Pemakaian) Akta Perhutanan Negara (Pindaan) 2011', where sub-s. 1(2) provides that the Enactment shall come into force on the date determined by His Royal Highness the Sultan by notification in the *Gazette*. The said Enactment was gazetted on 19 May 2011. Since it clearly provided in the amending legislation that the amended s. 11 of the NFA 1985 on the requirement of a public inquiry took effect on the date of the *Gazette*, that was on 19 May 2011, it clearly did not apply to the decision of MKN to excise part of the forest reserve in 2000. (paras 52 & 53)

Per Wong Kian Kheong JCA (concurring with majority judgment but dismissing on sole ground that leave application was time-barred):

(1) The appeal was dismissed solely on the ground that the leave application was time-barred pursuant to the first limb of O. 53 r. 3(6) of the ROC. Order 53 r. 3(6) has two alternative limbs, namely (i) the three months' period commences when the grounds of the judicial review application first arise ('first limb'); or (ii) the three months' period starts to run when the decision is first communicated to the applicant ('second limb'). The decision of MKN on 20 November 2000 was not communicated to the appellants. Hence, the second limb could not apply. (para 83)

(2) The first limb applied because the grounds of the judicial review application first arose when the *Gazette* notification (14 April 2022) was published. According to s. 18(3) of the Interpretation Acts 1948 and 1967, the *Gazette* notification (14 April 2022) constituted sufficient notice of MKN's decision on 20 November 2000. By virtue of the first limb, the three months' period commenced on 14 April 2022 and expired on 14 July 2022. However, leave application was only filed on 3 August 2022. Hence, the leave application was filed out of time. (para 83)

(3) The appellants should have applied to the High Court, pursuant to O. 53 r. 3(7) of the ROC, for an extension of time to file judicial review application with regards to MKN's decision on 20 November 2000. This was however not done. (para 83)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal [2020] 2 CLJ 73 CA ***(refd)***

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 FC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals [2023] CLJU 2226; [2023] 1 LNS 2226 CA ***(refd)***

Loh Kooi Choon v. Government Of Malaysia [1975] CLJU 90; [1975] 1 LNS 90 ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar [2024] 4 CLJ 353 CA ***(refd)***

P Maradeveran Periasamy & Ors v. Suruhanjaya Pilihan Raya & Anor [2019] 6 CLJ 173 CA ***(refd)***

Public Textiles Bhd v. Lembaga Letrik Negara [1976] CLJU 120; [1976] 1 LNS 120 FC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Commissions of Enquiry Act 1950, s. 3

Federal Constitution, arts. 5(1), 160(2)

Interpretation Acts 1948 and 1967, ss. 2(1)(a), 3, 18(3), 19(1), 20, 54(2)

National Forestry Act 1984, ss. 11, 12(a), (b), (c), (d), 13(1)(a), (b), (2)

Rules of Court 2012, O. 1A, O. 2 r. 1(2), O. 15 r. 6(1), (2)(b)(i), (ii), O. 16 r. 1(1), O. 53 rr. 1(1), 2(4), 3(6), (7)

Rules of the High Court 1980, O. 53 r. 2(4)

National Forestry Act (Adoption) Enactment 1985 (Selangor) (EN 5/1985), ss. 2, 11

For the appellant - Rajesh Nagarajan, Sachpreetraj Singh Sohanpal, Pavitra Loganathan, Amanda Sonia Mathew & Nur Izyan Azimi; M/s Raj & Sach

For the 1st-4th respondents - Khairul Nizam Abu Bakar; SFC & Siti Radziah Kamarudin; SLA, Selangor

For the 5th respondent - Lau Kee Sern, Ng Ka Choon & Eunice Aw Shze Xian; M/s Aaron KC Ng & Partners

For the 6th respondent - Ganapathi S Ramasamy & Marlia Mohd Azrin; M/s Al Sabri & Co

For the 7th respondent - John Wong Yok Hon, Sarah Low Wan Qi & Amanda Loh Li Xian; M/s Shui Tai

[Editor's note: Appeal from High Court, Shah Alam; Judicial Review No: BA-25-57-08-2022] (overruled).]

Reported by Lina E

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge dated 17 November 2022 in dismissing appellants' leave application for judicial review, to quash, *inter alia*, the decision of fourth respondent which degazetted part of the Forest Reserve in Bukit Cherakah.

Parties

[2] The first appellant is the legal officer for Pertubuhan Pelindung Khazanah Alam ("PEKA"), established in 2010. The second appellant is the legal officer for Persatuan Rimba Komuniti Shah Alam ("SACF"), that was officially formed in March 2016.

[3] The first to the fourth respondents are the State Executive Council ("MKN"), the State DG of Forestry, the State DG of PTG and the State Government of Selangor.

[4] The sixth respondent is Perbadanan Kemajuan Negeri Selangor, the owner of 350 acres of the said area. The said lands consist of (17) individual registry titles which was alienated by the State in December 2016. The sixth respondent has an indefeasible title to (133) hectares of land alienated by State of Selangor in December 2016.

[5] The seventh respondent, Restu Mantap Sdn Bhd is the owner of 50 acres in the said area, whilst the fifth respondent is the developer of those lands.

Salient Facts

[6] On 20 November 2000, the MKN made a decision to degazette part the Bukit Cherakah Forest Reserve as a permanent reserve forest, and to be alienated to nine companies including:

(i) Perbadanan Kemajuan Negeri Selangor ("PKNS") (350 acres);

(ii) SAS Estate Sdn Bhd ("SAS Estate") (50 acres);

(iii) Excel Nobel Const Sdn Bhd ("Excel Nobel") (50 acres);

(iv) Permaddun Sdn Bhd ("Permaddun") (50 acres); and

(v) the seventh respondent, Restu Mantap Sdn Bhd ("Restu") (50 acres).

[7] 150 acres of land alienated to SAS Estate, Excel Nobel and Permaddun had been fully developed into a housing area known as Alam Budiman which comprises, *inter alia*, residential and commercial buildings, including the Universiti Teknologi MARA, UiTM (Kampus Puncak Perdana), Masjid Puncak Perdana dan Sekolah Kebangsaan Puncak Perdana.

[8] The alienation of 50 acres of land in Bukit Cherakah Forest Reserve to the seventh respondent was carried out by the PTG *vide* its letter dated 30 January 2002. The purpose of the alienation was for "tujuan pembangunan" or development of residential buildings (including low-cost houses) and commercial buildings. For these purposes, on 11 June 2020, 279 land titles were issued to the seventh respondent.

[9] On 29 April 2011, the National Forestry Act (Adoption) (Amendment) Enactment 2011 introduced the requirement to hold a public inquiry into the de-gazettement process.

[10] The sixth respondent is legal and beneficial owner of (133) hectares of land which was alienated by State in December 2016 for development purposes, including residential and commercial.

[11] On 5 May 2022, a *Gazette* notification was issued pursuant to s. 13 of the National Forestry Act 1984 notifying the public of the decision by State Government to excise the Forest Reserve of Bukit Cherakah made in November 2000.

[12] Hence, the appellants filed the judicial review application seeking the following orders:

(i) that the appellants be given leave for their application to judicially review the issuance of the *Gazette* notification (National *Gazette* No. 1645 dated 14 April 2022 [PHNSe/.100- 1/9/1 J/d.2 (11): P.U. Se/ .(ADV) PS.05/4/5]) by the Executive Council of the State of Selangor on 5 May 2022 which degazetted 406.22 hectares of the Bukit Cherakah Forest Reserve (the "*Gazette* notification") by way of an order for *certiorari* for the quashing of the *Gazette* notification;

(ii) that the applicants be given leave for their application to judicially review the first and/or fourth respondents' decision on 20 November 2000 to degazette the Bukit Cherakah Forest Reserve (the "first and/or fourth respondents decision") by way of an order for *certiorari* as it is irrational for the respondents to allow for the development of the Bukit Cherakah Forest Reserve execute (*sic*) a decision that was made 22 years ago as the decision is now stale; and

(iii) that the applicants be given leave to judicially review the respondents decision to allow for development on the Bukit Cherakah Forest Reserve and to seek for a declaration that the requirement for a public investigation as stipulated in the National Forestry Act (adoption) (Amendment) Enactment 2011 must be complied with by the respondents as a prerequisite before the de-gazettement of any land can be allowed in the State of Selangor.

[13] The grounds for judicial review are procedural impropriety, illegality, retrospective *Gazette* and adverse impact.

[14] On the issue of procedural impropriety, the appellants argued that the decision of the respondents was procedurally improper, as there was no public inquiry prior to the publication of the *Gazette*, as required under s. 11 of the Selangor National Forestry Act (Adoption) Enactment 1985 ("NFA 1985").

[15] On the issue of illegality, the appellants contended that the decision was illegal and *ultra vires* as MKN lacked the legal authority to backdate the degazettement of forest reserves, making the decision unlawful.

[16] On the issue of retrospective *Gazette*, the appellants claimed that MKN's decision to backdate the *Gazette* was made with the specific purpose of rectifying the fact that forest reserve land had been given away for development while Bukit Cherakah was still a forest reserve. Hence, this retrospective action was improper and illegal.

[17] On the issue of adverse impact, the appellants argued that the degazettement deprived them of the benefit of the forest reserve, which they had been permitted to enjoy. Hence, the appellants claimed that they can apply for judicial review as the decision on degazettement in the year 2000 has adversely affect the rights or benefits of the appellants.

[18] After hearing the submissions of all the parties concerned, the learned High Court Judge had dismissed the leave application and the appellants have filed this appeal.

Decision Of The High Court Judge

[19] On the issue of *locus standi*, the learned judge found no evidence that the appellants were adversely affected by the decision of MKN to degazette the Bukit Cherakah Forest Reserve in 2000. The learned judge held that the appellants have failed to demonstrate how their rights or obligations were altered or how they were deprived of a benefit they were permitted to enjoy. This is because the first appellant (PEKA) was established in 2010, whilst the second appellant (SACF) was established in 2016. The decision to degazette the forest reserve was made in 2000, long before the appellants' organisations were formed. Therefore, the learned judge held that the appellants could not claim to have been adversely affected by a decision made prior to their existence.

[20] The learned judge also held the pursuant to O. 53 r. 3(6) of the Rules of Court 2012, a judicial review application must be filed within three months of the decision being made. In the present case, since the decision to degazette was made in 2000, the learned judge held that the application was therefore out of time as there was and no extension of time that was sought by the appellants.

[21] The learned judge also took note that the requirement for a public inquiry under s. 11 of the Selangor National Forestry Act (Adoption) Enactment 1985 only came into effect in 2011, long after the 2000 decision. Therefore, since the decision to degazette was made long before this amendment, the court ruled that no public inquiry was required.

[22] The appellants have argued that the 2022 *Gazette* could not retrospectively validate the 2000 decision. However, the learned judge had referred to s. 20 of the Interpretation Acts 1948 and 1967, which allows subsidiary legislation to operate retrospectively, provided it does not impose penalties. Therefore, the learned judge held that the retrospective *Gazette* to be valid and consistent with the 2000 decision.

Our Decision

Locus Standi

[23] The appellants argued that for the purposes of the leave application, they need to show that they have a real and genuine interest in the subject matter, the Bukit Cherakah Forest Reserve.

[24] The first appellant is the legal officer for PEKA, an environmental organisation founded in 2010. PEKA aims to protect ancient rainforests and biodiversity. It is run entirely by unpaid volunteers, holds elections every two years, and is active in conservation work. The group has over 15,000 followers on Facebook, more than 300 members, and have branches in six states across Malaysia.

[25] The second appellant is the legal officer for SACF, an organisation focused on protecting the Shah Alam Community Forest, located between several neighbourhoods in Shah Alam, Selangor. SACF was formed in March 2016 to save and officially protect this forest.

[26] The learned judge has ruled that the appellants lacked *locus standi*, as they were not adversely affected by the 2000 decision to degazette the Bukit Cherakah Forest Reserve. This is because the first appellant (PEKA) was established in 2010, whilst the second appellant (SACF) was established in 2016, well after the decision made in 2000. As such, they have failed to show any change in their rights or deprivation of benefits.

[27] We are of the considered opinion, and we agree with the appellants that the learned judge has erred in law in her decision on the issue of *locus standi*.

[28] The application for judicial review is limited to parties who are adversely affected by a decision, action, or omission in the exercise of a public duty or function, as provided under O. 53 r. 2(4) of the ROC 2012.

[29] In areas of public interest litigation, the apex court has taken a liberal approach on the issue of *locus standi*. The Federal Court in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, explained the following as the test that is applicable in deciding whether to grant leave to institute judicial review proceedings:

> In our view for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

[30] A similar position was taken by the Federal Court in the case of *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167, where the apex court held as follows: A

[470] This element of public inclusion naturally broadens the categories of persons who may challenge a development order, particularly where the development does not conform to the structure plan. If the public participated in the implementation of the statutory development plan as the legislature has seen fit to provide, then indubitably a member of the public can challenge a development which fails to conform to the statutory development plan, if he has a genuine interest. This is particularly so when the local authority gives no reason for varying or altering the features of the structure plan, and does not follow the prescribed statutory provisions for variation or alteration as provided for under the FT Act. B C

[471] Put another way, the words 'adversely affected' in O. 53 in the instant appeals has to be construed in the light of the FT Act. The FT Act envisages public participation in the statutory development process at the inception, resulting in the gazetting of the same, followed by further public participation in the event of any alteration or variation of the statutory development plans. *Therefore, standing to sue should, in like manner, extend to members of the public who can show a genuine interest in the matter, again in the public interest and with the expertise or knowledge to raise objections in relation to proper planning.* Whether or not the challenge succeeds on the substantive merits is a different issue. D E

…

[477] It would follow from our analysis above that all the respondents do enjoy standing to sue. This is because the first to fifth respondents represent parcel proprietors in developments close to or neighbouring the subject land. These parcel proprietors, being residents close to the subject land which was a public space comprising a park for public use, are adversely affected by the appropriation of half such space for the purposes of a private development. They have a genuine interest in such appropriation and alienation of public land for private development. It encroaches onto their rights of enjoyment of the public space as a park. Similarly so with the sixth to tenth respondents who are similarly placed to enjoy their individual rights to utilise the subject land as a public park. F G

[478] As such these Respondents all fall within category of persons who are adversely affected because they are able to show a genuine interest in the subject land and its development otherwise than in conformity with the KL Structure Plan which was gazetted in 2004. There is no necessity as borne out by *MTUC* and *QSR Brands* for these parties to prove that they have suffered special detriment or prejudice which is personal to them. In point of fact the Respondents can and have established this as they have all lost their rights to utilisation and enjoyment of the light, air and environment of the public space previously comprising a public park, namely Taman Rimba, which has since been alienated and now utilised for private development. H I

A [479] *Each of the Respondents has standing to sue by reason of their complaint of an encroachment into their private rights as well as their rights as a member of the public.* Each of them claims a loss of a private right to enjoy their rights of access to part of what was a public park. This is a private right. They also in their capacity as members of the public who have a right to contribute towards the development of their area *via* the KL Structure B Plan and in that context enjoy a public law right. Both appear to have been affected, for purposes of standing to sue, in the present appeals.

(emphasis added)

[31] We are of the considered opinion that since this appeal constitutes a C public interest litigation and the appellants act in the public interest as nature conservationists, the appellants have a real and genuine interest in protecting the Bukit Cherakah Forest Reserve. As such, the appellants have the necessary *locus standi* to file the judicial review application.

Prayer (b)

D **[32]** Next, we will deal with prayer (b) of the judicial review application, which is to quash the decision of MKN dated 20 November 2000 to degazette the Bukit Cherakah Forest Reserve. The prayer reads as follows:

(ii) That the Applicants be given leave for their application to judicially review the 1st and/or 4th Respondents' decision on 20.11.2000 to E degazette the Bukit Cherakah Forest Reserve (the "1st and/or 4th Respondents Decision") by way of an order for *certiorari* as it is irrational for the Respondents to allow for the development of the Bukit Cherakah Forest Reserve execute (*sic*) a decision that was made 22 years ago as the decision is now stale.

F **[33]** We are of the considered opinion that the learned judge did not err in law in dismissing the leave application with regards to prayer (b). The impugned decision was made in year 2000 and this application was filed more than 20 years later. Such an application failed to comply O. 53 r. 3(6) of the ROC 2012 which provides that an application for leave shall be filed G promptly, and within three months from the date when the grounds of application first arose or when the decision was first communicated to the appellant.

[34] Even if the appellants have no knowledge of the impugn decision made in year 2000 (as they were only established in 2010 and 2016 respectively), H the grounds of the application would have arisen when parts of the said lands were alienated to the other parties, including the seventh respondent and the sixth respondent between 2001 to 2016 respectively. Thereafter, the said parties have developed the said lands into housing estates, including Taman Budiman and the Universiti Teknologi MARA, UiTM (Kampus Puncak I Perdana).

[35] Therefore, from the date of the decision in 2000, to the alienation of the state land in 2001 to 2016, we are of the considered opinion that the application to review the 2000 decision is clearly out of time and this goes to the issue of jurisdiction.

[36] The Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193 held as follows:

> ... we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

Prayer (a)

[37] Prayer (a) is to quash the *Gazette* notification dated 14 April 2022. Prayer (a) reads as follows:

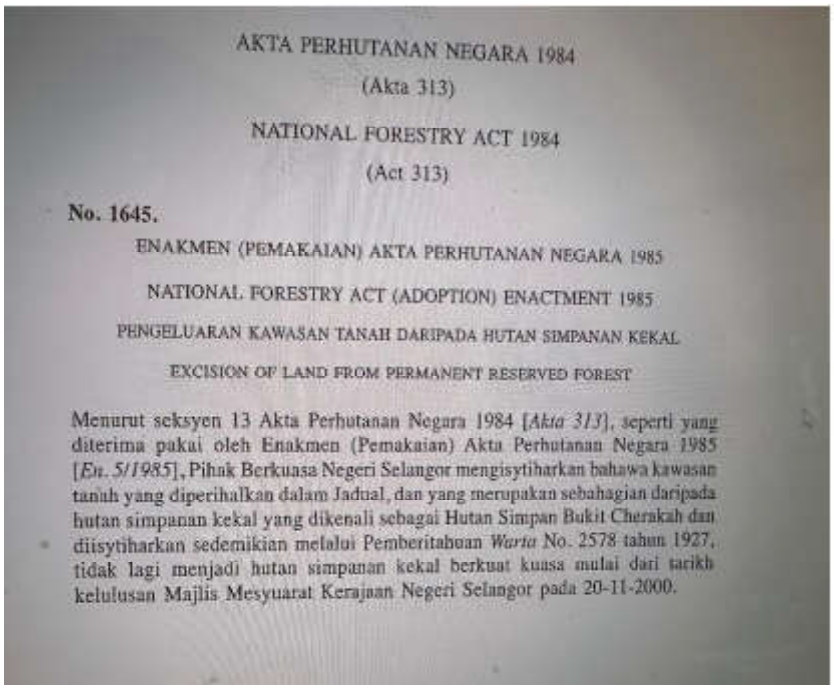
> (i) That the applicants be given leave for their application to judicially review the issuance of the *Gazette* notification (National *Gazette* No.1645 dated 14.04.2022 [PHNSe/.100-1/9/1 J/d.2 (11): P.U. Se/.(ADV) PS.05/4/5]) by the Executive Council of the State of Selangor on 05.05.2022 which degazetted 406.22 hectares of the Bukit Cherakah Forest Reserve (the "*Gazette* Notification") by way of an order for *certiorari* for the quashing of the *Gazette* Notification.

[38] The first issue is whether the *Gazette* notification dated 14 April 2022 is a decision that is subject to review. The *Gazette* notification is made pursuant to s. 13 of the National Forestry Act 1984 ("NFA 1984"), which provides that:

> 13. State Authority to notify in the *Gazette* any excision of land from permanent reserved forest
>
> (1) Whenever any land is excised from a permanent reserved forest, the State Authority shall cause to be published in the *Gazette* a notification -
>
> (a) specifying the situation and extent of such land; and
>
> (b) declaring that such land shall cease to be a permanent reserved forest from a date fixed by the notification.
>
> (2) From the date so fixed, such land shall cease to be a permanent reserved forest.

[39] We are of the considered opinion that the s. 13 of the NFA 1984 *Gazette* notification is not a decision to excise land from a permanent reserve forest. The decision to excise land from a permanent reserve forest was already made in year 2000, and the *Gazette* notification is to comply with the statutory requirement of s. 13.

[40] Section 13 clearly provides that after the decision to excise was made, the said decision shall be published in the *Gazette* notification, specifying the situation and extent of such land and to declare that such land shall cease to be a permanent reserved forest from a date fixed by the notification, which is 20 November 2000. From this date, that is 20 November 2000, such land shall cease to be a permanent reserved forest. The *Gazette* notification reads:



AKTA PERHUTANAN NEGARA 1984

(Akta 313)

NATIONAL FORESTRY ACT 1984

(Act 313)

No. 1645.

ENAKMEN (PEMAKAIAN) AKTA PERHUTANAN NEGARA 1985

NATIONAL FORESTRY ACT (ADOPTION) ENACTMENT 1985

PENGELUARAN KAWASAN TANAH DARIPADA HUTAN SIMPANAN KEKAL

EXCISION OF LAND FROM PERMANENT RESERVED FOREST

Menurut seksyen 13 Akta Perhutanan Negara 1984 [*Akta 313*], seperti yang diterima pakai oleh Enakmen (Pemakaian) Akta Perhutanan Negara 1985 [*En. 5/1985*], Pihak Berkuasa Negeri Selangor mengisytiharkan bahawa kawasan tanah yang diperihalkan dalam Jadual, dan yang merupakan sebahagian daripada hutan simpanan kekal yang dikenali sebagai Hutan Simpan Bukit Cherakah dan diisytiharkan sedemikian melalui Pemberitahuan *Warta* No. 2578 tahun 1927, tidak lagi menjadi hutan simpanan kekal berkuat kuasa mulai dari tarikh kelulusan Majlis Mesyuarat Kerajaan Negeri Selangor pada 20-11-2000.

[41] The above *Gazette* notification clearly shows that the excision decision was made pursuant to the "kelulusan Majlis Mesyuarat Kerajaan Negeri Selangor pada 20 November 2000". The notification in the *Gazette* will specify the effective date from which the land ceases to be a permanent reserved forest. From this date, that is 20 November 2000, the land is no longer subject to the regulations that apply to forest reserves.

[42] As such, we cannot agree with the appellant's submission that the "publication on 5 May 2022 with the decision to hold 20 November 2000 as the effective date is essentially the decision date in this case. The crystallisation of the effective date had only come after the publication of the *Gazette* on 5 May 2022."

[43] It must be noted that the main complaint of the appellants is against the decision of MKN to excise land from the permanent forest reserve. This decision has already been made on 20 November 2000. Arising from this decision the land reverts to the State, and the State had thereafter alienated the said land to the parties concerned, including the sixth and seventh respondents. Therefore, we are of the considered opinion that the *Gazette* notification dated 5 May 2022 is not a decision to degazette part of the forest reserve. It is merely a notification that a decision to degazette was made by MKN and that the decision was made on 20 November 2000 and takes effect from that date. (see *P Maradeveran Periasamy & Ors v. Suruhanjaya Pilihan Raya & Anor* [2019] 6 CLJ 173; [2019] 2 MLJ 70).

[44] Added to that, we are of the considered opinion that the decision to degazette part of the forest reserve is a policy decision by the State. This can be seen from the purpose of the alienation of the said land, which was for "tujuan pembangunan" or development of residential buildings and commercial buildings. Indeed Taman Budiman and the Universiti Teknologi MARA, UiTM (Kampus Puncak Perdana) testify to that effect.

[45] As such, we find that it is a policy decision of the State, whether to maintain the said land as forest reserve or to develop the same for the community. It is not within the purview of the courts to decide on policy matters as decided by the Federal Court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009, where the Federal Court held that a policy decision is not amenable to judicial review and that the question whether a decision based on policy considerations is amenable to judicial review may be determined at the leave stage if the evidence of the impugned policy is before the court. **However, we say this with a rider,** that MKN's decision must comply with the statutory requirements, including a public inquiry pursuant to s. 11 of the National Forestry Enactment, which took effect on 19 May 2011 (emphasis added).

[46] In the present case, we take note that when the decision to excise part of the forest reserve was made by MKN in 2000, there was no requirement for a public inquiry, as the amendment only took effect on 19 May 2011.

Prayer (c)

[47] In prayer (c), the appellants are seeking a declaration that the requirement for a public inquiry as stipulated in the National Forestry Act (Adoption) (Amendment) Enactment 2011 must be complied with by the respondents as a prerequisite before the degazettement of any land can be allowed in the State of Selangor. This prayer reads:

A (iii) That the Applicants be given leave to judicially review the Respondents decision to allow for development on the Bukit Cherakah Forest Reserve and to seek for a declaration that the requirement for a public investigation as stipulated in the National Forestry Act (adoption) (Amendment) Enactment 2011 must be complied with by the Respondents as a prerequisite before the degazettement of any land can
B be allowed in the state of Selangor.

[48] On 29 April 2011, the Forestry Act (Adoption) (Amendment) Enactment 2011 introduced the requirement to hold a public inquiry into the de-gazettement process. This requirement, through s. 11 of the National Forestry Act (Adoption) Enactment 1985, became operative on 19 May
C 2011, the date of the *Gazette* notification.

[49] The amended s. 11 of the 1985 Enactment reads as follows:

Dengan syarat tanah tersebut hanya boleh dikeluarkan setelah diadakan suatu penyiasatan awam sebagaimana yang ditetapkan oleh Pihak
D Berkuasa Negeri.

[50] As to whether, s. 11 of the 1985 Enactment is retrospective or prospective, one need to look at the legislation itself. In *Loh Kooi Choon v. Government Of Malaysia* [1975] CLJU 90; [1975] 1 LNS 90, the Federal Court held as follows:

E In so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament. If such was the intention that the Act
F was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.

[51] Indeed, s. 19 of the Interpretation Acts 1948 and 1967 provides that the commencement of an Act or subsidiary legislation shall be the date
G provided in or under the Act or subsidiary legislation or, where no date is so provided, the date immediately following the date of its publication in pursuance of s. 18.

[52] In the present appeal, s. 11 of the 1985 Enactment was enacted pursuant to the "Enakmen (Pemakaian) Akta Perhutanan Negara (Pindaan)
H 2011", where sub-s. 1(2) provides that the Enactment shall come into force on the date determined by His Royal Highness the Sultan by notification in the *Gazette*. And the said Enactment was gazetted on 19 May 2011.

[53] Therefore, since it is clearly provided in the amending legislation that the amended s. 11 of the 1985 Enactment on the requirement of a public
I inquiry takes effect on the date of the took *Gazette*, that is on 19 May 2011, it clearly does not apply to the decision of MKN to excise part of the forest reserved in 2000.

Conclusion

[54] Order 53 r. 3 of the ROC 2012 clearly provides that prior to commencing an application for judicial review, leave must first be obtained by the appellants. In the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 the Federal Court held that the test for leave to commence judicial review is as follows:

> [12] ... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[55] In *Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal* [2020] 2 CLJ 73; [2020] 3 MLJ 114, this court held that the duty of the court in hearing the application for leave for judicial review is to filter the application before it, that is to determine whether the application was not frivolous and vexatious, and that there is an arguable case to merit further argument.

[56] Premised on the reasons enumerated above, we are of the considered opinion that the learned HCJ did not commit an appealable error in dismissing the leave application. The application to challenge MKN decision dated 20 November 2000 to excise part of the Bukit Cherakah Forest Reserve is clearly out of time.

[57] The application to challenge the *Gazette* notification dated 14 April 2022 and the issue of the public inquiry under the amended s. 11 of the 1985 Enactment do not merit further arguments as the *Gazette* notification dated 14 April 2022 is not a decision but a notification to the public that a decision to excise part of the forest reserve for the purpose of community development, such as the establishment of UiTM and several housing projects was made in 2000. In respect of the requirement of a public inquiry under the amended s. 11 of the 1985 Enactment, the amending legislation, the "Enakmen (Pemakaian) Akta Perhutanan Negara (Pindaan) 2011", clearly provides that the amended provision takes effect from the date of the *Gazette* notification, that is on 19 May 2011.

[58] For the aforesaid reasons, we are of the considered opinion that there are no merits in this appeal and the appeal is therefore dismissed with no order as to costs.

[59] My learned sister, Justice Azimah Omar has seen this judgment in draft and has agreed to it. My learned brother, Justice Wong Kian Kheong has written a separate judgment in dismissing the appeal.

Wong Kian Kheong JCA:

Introduction

[60] We have dismissed the above appeal (this appeal) with no order as to costs (our decision).

[61] My learned sister, Azizah Nawawi JCA, has previously forwarded to me a copy of her draft written judgment regarding our decision (Azizah Nawawi JCA's judgment). After reading Azizah Nawawi JCA's judgment, I have prepared this judgment. A draft copy of this judgment has been forwarded to my learned sisters, Azizah bt Haji Nawawi and Azmah bt Omar JJCA.

[62] The salient facts pertaining to this appeal have been stated in Azizah Nawawi JCA's judgment and I will gratefully adopt them.

[63] In support of our decision, I wish to discuss the following issues in this judgment:

(i) whether registered societies with the aim of, among others, protecting the environment, such as the appellants in this appeal (appellants), were "adversely affected" by the decision of the State Authority of Selangor (SA) on 20 November 2000 to excise 406.22 hectares of "Bukit Cherakah Forest Reserve" (excised land) as "permanent reserved forest" (SA's decision (20 November 2000)) and could therefore apply to court for a judicial review of the SA's decision (20 November 2000) pursuant to O. 53 r. 2(4) of the Rules of Court 2012 (RC);

(ii) was the SA's decision (20 November 2000) a policy decision which was not amenable to judicial review?;

(iii) if the SA's decision (20 November 2000) was amenable to judicial review:

(a) could the SA lawfully *Gazette* the SA's decision (20 November 2000) on 14 April 2022 (after a period of more than 21 years and four months) by way of Selangor State *Gazette* no. 1645 (*Gazette* Notification (14 April 2022))? In this regard, could the learned High Court Judge rely on ss. 19(1) and 20 of the Interpretation Acts 1948 and 1967 (IA) (regarding "subsidiary legislation") to decide that the SA could lawfully *Gazette* the SA's decision (20 November 2000)?

(b) whether the appellants could apply for a judicial review of the *Gazette* Notification (14 April 2022)?

(c) whether the appellants' application for leave to commence judicial review in this case (leave application) had failed to comply with the mandatory time period of three months as stipulated in O. 53 r. 3(6) RC?

(iv) as the SA had alienated parts of the excised land to the fifth to the seventh respondents in this appeal ("fifth respondent" to "seventh respondent"), whether the appellants should have filed a private law suit, *eg*, a writ or originating summons (private law action) in this case (instead of a judicial review application).

The SA Was Not Cited As A Party In This Case

[64] The leave application had cited the Selangor State Executive Council (State Exco) as the first respondent (first respondent).

[65] With respect, according to s. 11 of the National Forestry Act 1984 (NFA), the decision to excise part of Bukit Cherakah Forest Reserve as "permanent reserved forest" (defined in s. 2 of the NFA as "land constituted or deemed to have been constituted a permanent reserved forest" under the NFA) was made by the SA and not by the State Exco. Reproduced below is s. 11 of the NFA (before the enforcement of s. 2 of the Selangor's National Forestry Act (Adoption) Enactment (Amendment) 1985 (NFA(A)E(A)):

[SA] may excise land from permanent reserved forest

s. 11 The [SA], if satisfied that any land in a permanent reserved forest -

(a) **is no longer required for the purpose for which it was classified under section 10; and**

(b) **is required for economic use higher than that for which it is being utilized,**

may excise such land from the permanent reserved forest.

(emphasis added)

With effect from 29 April 2011, NFA(A)E(A) had introduced a proviso to s. 11 of the NFA (proviso (s. 11 of the NFA)). According to the proviso (s. 11(1) of the NFA), the SA shall conduct a public inquiry before excising any permanent reserved forest. In this regard, I share the view of my learned sister, Azizah Nawawi JCA, that the Proviso (s. 11 of the NFA) did not apply retrospectively to the SA's decision (20 November 2000).

[66] Part 1 IA applies to NFA because NFA was enacted after 18 May 1967 – please refer to s. 2(1)(a) IA. Section 3 IA (in Part 1 IA) defines SA as "the Ruler or Yang di-Pertua Negeri of a State and includes, in Negeri Sembilan, the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs."

[67] "Executive Council" is defined in art. 160(2) of the Federal Constitution (FC) as "the Cabinet or other body, however called, which in the Government of a State corresponds, whether or not the members of it are Ministers, to the Cabinet of Ministers in the government of the Federation (and in particular includes the Supreme Council in Sarawak)".

[68] As explained in the above paras. 6 to 8, there is a clear distinction between the SA and the State Exco. As such, the leave application should have cited the SA (not the State Exco) as the first respondent. However, nothing in this appeal turns on this mistake. This is because, firstly, by virtue of O. 15 r. 6(1) of the RC, "A cause or matter shall not be defeated by reason of the misjoinder … of any party (the appellants joined the State Exco and not the SA), and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter". Secondly, none of the respondents in this case had objected to the leave application on the ground that the appellants had erroneously cited the State Exco (instead of the SA) as the first respondent.

Were The Appellants "Adversely Affected" By The SA's Decision (20 November 2000)?

[69] Order 53 r. 2(4) of the RC provides as follows:

> **Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.** (emphasis added)

[70] It is to be noted that before the enforcement of RC, the Rules Committee had inserted a new O. 53 in the then Rules of the High Court 1980 (RHC) by way of the Rules of the High Court (Amendment) 2000, PU(A) 342/00 (which took effect on 21 September 2000). For the first time, with effect from 21 September 2000, O. 53 r. 2(4) RHC had expressly provided for the *locus standi* requirement for judicial review applications. Order 53 r. 2(4) of the RHC is in *pari materia* with our present O. 53 r. 2(4) of the RC.

[71] In view of the express *locus standi* requirement stipulated in O. 53 r. 2(4) of the RHC (with effect from 21 September 2000) and now in O. 53 r. 2(4) of the RC, cases which had decided on the *locus standi* requirement prior to 21 September 2000, should be read with caution.

[72] The learned Senior Federal Counsel (SFC) for the first to the fourth respondents in this appeal had submitted that the appellants were not adversely affected by the SA's decision (20 November 2000) within the meaning of O. 53 r. 2(4) of the RC. According to the learned SFC, the appellants' rights, obligations and benefits had not been altered or deprived by the SA's decision (20 November 2000). The learned SFC relied on the following judgment of the Federal Court delivered by Raus Sharif FCJ (as he then was) in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490, at [3], [26] and [27] *(Suruhanjaya Siasatan Mengenai Rakaman Klip Video)*:

[3] On 7 February 2011, this court pursuant to s. 96 of the Courts of Judicature Act 1964 ('the CJA') granted the attorney general's application for leave to appeal against the decision of the Court of Appeal on a single question, namely:

> Whether the findings of the Commission of Enquiry pursuant to s. 3 of the Commission of Enquiry Act 1950 is reviewable under O. 53 [RHC].

…

[26] It is trite law that the purpose of an order for certiorari is to quash the legal effect of a decision. In England, in the case of Council of Civil Service Unions and others v. Minister for the Civil Service [1984] 3 All ER 935 the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[27] We adopt the same view. Under the scheme of O. 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review. … (emphasis added)

I am not able to accede to the above submission because the sole issue which arose in *Suruhanjaya Siasatan Mengenai Rakaman Klip Video* was whether a decision of the Commissions of Enquiry under s. 3 of the Commissions of Enquiry Act 1950 is amenable to judicial review. Our apex court did not decide on the meaning of "adversely affected" in O. 53 r. 2(4) of the RC in *Suruhanjaya Siasatan Mengenai Rakaman Klip Video.*

[73] I concur with the view stated in Azizah Nawawi JCA's judgment that the appellants had fulfilled O. 53 r. 2(4) of the RC and were therefore entitled to file the leave application in this case. My reasons are as follows:

(i) notwithstanding the fact that:

(a) the rights of the appellants had not been adversely affected by the SA's decision (20 November 2000); and/or

(b) the appellants had not suffered any "special damage" or "special loss" (over and above all other persons) due to the SA's decision (20 November 2000)

– the appellants as nature conservationists:

(1) had a "real and genuine interest" to protect the Bukit Cherakah Forest Reserve (the subject matter of the SA's decision (20 November 2000)) – please refer to the judgment of the Federal Court delivered by Hasan Lah FCJ in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, at [58]; and

(2) were "adversely affected" by the SA's decision (20 November 2000) as understood in O. 53 r. 2(4) RC; and

(ii) I reproduce below O. 1A and O. 2 r. 1(2) of the RC:

O. 1A Regard shall be to justice

In administering [RC], the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with [RC].

O. 2 r. 1(2) [RC] are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective. (emphasis added)

In accordance with O. 1A and O. 2 r. 1(2) of the RC, the phrase "adversely affected" in O. 53 r. 2(4) of the RC should be construed widely with "regard to the overriding interest of justice" and "subject to the overriding objective of enabling the court to deal with cases justly".

In this case, it is clear, beyond peradventure, that the appellants with the aim of, among others protecting the environment, are "adversely affected" by the SA's decision (20 November 2000) as understood in O. 53 r. 2(4) of the RC. If otherwise, there would be an injustice and the phrase "adversely affected" in O. 53 r. 2(4) of the RC would have been construed in a manner contrary to O. 1A and O. 2 r. 1(2) of the RC.

[74] In view of the reasons stated in the above para. [14], the learned High Court Judge had committed an error of law in deciding that the appellants lacked *locus standi* to file the leave application within the meaning of O. 53 r. 2(4) of the RC.

Was The The SA's Decision (20 November 2000) Amenable To Judicial Review?

[75] According to the learned SFC, the SA's decision (20 November 2000) was not justiciable due to public policy considerations. With respect, I am not able to accept this contention because:

(i) once a party (X) is "adversely affected" (within the meaning of O. 53 r. 2(4) of the RC) by:

(a) a provision of written law;

(b) an executive policy, action and decision; and

(c) an administrative policy, action and decision

(referred collectively in this judgment as the "impugned matter")

(1) X has a right to apply for a judicial review of the impugned matter (right (judicial review application)) under O. 53 r. 1(1) of the RC read with para. 1 of the Schedule to the Courts of Judicature Act 1964 (para. 1). Reproduced below are O. 53 r. 1(1) of the RC and para. 1:

> **O. 53 r. 1 Application for judicial review**
>
> (1) **This Order shall govern all applications seeking the relief specified in [Paragraph 1] and for the purposes therein specified.**
>
> Paragraph 1 **Prerogative writs**
>
> **Power to issue to any person or authority** directions, **orders** or writs, including writs of the nature of *habeas corpus,* ***mandamus,*** **prohibition,** ***quo warranto*** **and** ***certiorari*****, or any others,** for the enforcement of the rights conferred by Part II [FC], or any of them, **or for any purpose.** (emphasis added);

(ii) the right (judicial review application) cannot be denied merely due to public policy considerations. If X is deprived of the right (judicial review application) solely due to public policy considerations:

(a) this will cause an injustice to X;

(b) the right (judicial review application) is part of X's fundamental access to justice (fundamental access to justice). Fundamental access to justice is guaranteed under art. 5(1) FC – please refer to the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, at [4];

(c) this will undermine the rule of law; and

(d) this is contrary to good public governance. The need for good public governance has been recognised by the Court of Appeal in *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907, at (33(ii)); and

(iii) in *Public Textiles Bhd v. Lembaga Letrik Negara* [1976] CLJU 120; [1976] 1 LNS 120; [1976] 2 MLJ 58, at 63, Raja Azlan Shah FJ (as His Majesty then was) delivered the following judgment in the Federal Court:

The term public policy is vague and unsatisfactory. From time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The "unruly horse" of Hobart C.J. is common place: see Fender v. Mildmay (1938) AC 10. In my opinion, the public policy yardstick is too wide and elusive.
(emphasis added)

Could The SA Lawfully *Gazette* The SA's Decision (20 November 2000) In *Gazette* Notification (14 April 2022)?

[76] I reproduce below ss. 12 and 13 of the NFA:

NFA

s 12 *[SA] to replace land excised from permanent reserved forest*

Where any land is excised under section 11 the [SA] shall, wherever possible and if it is satisfied that it is in the national interest so to do having regard to -

(a) *the need for soil and water conservation, biodiversity and other environmental consideration;*

(b) *the need to sustain timber production in the State in order to meet the requirements of the forest industry;*

(c) *the economic development of the State; and*

(d) *the availability of suitable land, constitute in accordance with section 7 an approximately equal area of land a permanent reserved forest.*

s 13 [SA] to notify in the Gazette any excision of land from permanent reserved forest

(1) Whenever any land is excised from a permanent reserved forest, the State Authority shall cause to be published in the Gazette a notification -

(a) *specifying the situation and extent of such land; and*

(b) *declaring that such land shall cease to be a permanent reserved forest from a date fixed by the notification.*

(2) From the date so fixed, such land shall cease to be a permanent reserved forest.
(emphasis added)

[77] Before the enforcement of NFA(A)E(A), I am of the view that the SA can lawfully excise land in a permanent reserved forest (SA's excision) under s. 11 of the NFA if the following two conditions are fulfilled cumulatively:

(i) the SA is satisfied that having regard to the considerations stipulated in s. 12(a) to (d) of the NFA, the SA's excision is in the national interest (first condition (SA's excision)). The first condition (SA's excision) is mandatory because Parliament has employed a mandatory term "shall" in s. 12 of the NFA; and

(ii) in accordance with s. 13(1)(a), (b) and (2) of the NFA, the SA "shall cause to be published in the *Gazette* a notification" of the SA's excision (second condition (SA's excision)). With regard to the second condition (SA's excision):

(a) the second condition (SA's excision) is a mandatory requirement imposed by Parliament because an imperative term "shall" is used in s. 13(1) and (2) of the NFA; and

(b) s. 13(1)(a), (b) and (2) of the NFA do not prescribe a time period for the *Gazette* notification of the SA's excision. In this regard, s. 54(2) of the IA (in Part 1 IA) shall apply wherein the SA shall notify the SA's excision in the *Gazette* "with all convenient speed". According to s. 54 of the IA:

> s 54 **Computation of time**
>
> (1) In computing time for the purposes of any written law -
>
> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> (b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;
>
> (c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and
>
> (d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.
>
> (2) *Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.* (emphasis added)

If s. 54(2) of the IA does not apply in the enforcement of the second condition (SA's excision), the SA's excision can be gazetted at any time after the making of the SA's excision (as had happened in this case). When a SA's excision is not gazetted "with all convenient speed" in accordance with s. 54(2) of the IA, the SA may subsequently alienate the excised land to third parties and in such an event:

(i) it may be difficult, if not impossible, for any party who is "adversely affected" by the SA's excision to challenge the validity of the SA's excision. This is because innocent third parties (who have expended much time, effort and resources based on the SA's excision) may suffer irreparable damage if the court subsequently invalidates the SA's excision;

(ii) if the SA's excision cannot be lawfully challenged in court, there is a high risk that the SA's discretion to excise land in a permanent reserved forest, may not be lawfully exercised in accordance with the mandatory first condition (SA's excision). This in turn may defeat the purpose of Parliament in legislating ss. 12(a) to (d) of the NFA in the first place; and

(iii) this is not only contrary to good public governance but may facilitate abuse of public power and corruption.

Whether ss. 19(1) And 20 IA Apply In This Case

[78] I reproduce below the definition of "subsidiary legislation" in s. 3 IA as well as ss. 19(1) and 20 of the IA:

> s 3 - *"subsidiary legislation" means any* proclamation, rule, regulation, order, *notification,* by-law or other instrument *made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect;*
>
> *Commencement*
>
> s 19(1) *The commencement of* an Act or *subsidiary legislation shall be the date provided in* or under the Act or *subsidiary legislation* or, where no date is so provided, the date immediately following the date of its publication in pursuance of section 18.
>
> …
>
> *Subsidiary legislation may be retrospective*
>
> s 20 *Notwithstanding the absence of any express provision in any Act or other written law, where such Act or other written law empowers any person to make subsidiary legislation, such subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made* or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:
>
> Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published. (emphasis added)

[79] With respect, the learned High Court Judge in this case had committed an error of law in relying on ss. 19(1) and 20 of the IA to decide that the SA could lawfully *Gazette* the SA's decision (20 November 2000) in the *Gazette* notification (14 April 2022) (after a period of more than 21 years and four months from the date of the SA's decision (20 November 2000)). This is because ss. 19(1) and 20 of the IA only apply to "subsidiary legislation" as defined in s. 3 of the IA. Neither the SA's decision (20 November 2000) nor the *Gazette* notification (14 April 2022) have any "legislative effect" as understood in the definition of "subsidiary legislation" in s. 3 of the IA. It is therefore clear that there is no room to apply ss. 19(1) and 20 of the IA in this case to the SA's decision (20 November 2000) and the *Gazette* notification (14 April 2022).

Could The Appellants Apply For A Judicial Review Of The *Gazette* Notification (14 April 2022)?

[80] It is clear that the SA's decision (20 November 2000) (not the *Gazette* notification (14 April 2022)) had excised land from Bukit Cherakah Forest Reserve. Furthermore, as a result of the SA's decision (20 November 2000) (not the *Gazette* notification (14 April 2022)), the SA had alienated parts of the excised land in favour of the fifth to seventh respondents. In the circumstances, the appellants could only apply for a judicial review of the SA's decision (20 November 2000) and not the *Gazette* notification (14 April 2022). As correctly decided in Azizah Nawawi JCA's judgment, the *Gazette* notification (14 April 2022) was merely a notification of the SA's decision (20 November 2000).

Was The Leave Application Time-barred?

[81] Order 53 r. 3(6) and (7) of the RC provide as follows:

> O. 53 r. 3(6) *An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.*
>
> (7) *The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.* (emphasis added)

[82] It is not in dispute that the three-month period under O. 53 r. 3(6) of the RC (three months' period) is mandatory. Suffices for me to cite the following judgment of the Court of Appeal in *Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar* [2024] 4 CLJ 353; [2024] 4 MLJ 770, at [15(c)]:

> [15(c)] *an Applicant has to comply with the mandatory time period to file a JRA (Limitation Period) as provided in O. 53 r. 3(6) RC (3rd Mandatory Requirement). The 3rd Mandatory Requirement is clear due to the employment of an imperative term "shall" in O. 53 r. 3(6) RC. As JRAs concern public law matters, it is in the public interest as well as it is in the interest of the Applicants for JRAs to be filed expeditiously. Hence, the purpose of the 3rd Mandatory Requirement.*
>
> *If an Applicant has exceeded the Limitation Period, the Applicant has to obtain leave of the High Court pursuant to O. 53 r. 3(7) RC to file the JRA.* (emphasis added)

[83] I am of the following view:

(i) Order 53 r. 3(6) of the RC has two alternative limbs, namely:

(a) the three months' period commences when the grounds of the judicial review application first arose (first limb (O. 53 r. 3(6) of the RC)); or

(b) the three months' period starts to run when the decision is first communicated to the applicant (second limb (O. 53 r. 3(6) of the RC);

(ii) the SA's decision (20 November 2000) was not communicated to the appellants. Hence, the second limb (O. 53 r. 3(6) of the RC) could not apply in this case;

(iii) the first limb (O. 53 r. 3(6) of the RC) applied in this case because the grounds of the judicial review application first arose when the *Gazette* notification (14 April 2022) was published. According to s. 18(3) of the IA, the *Gazette* notification (14 April 2022) constituted sufficient notice of the SA's decision (20 November 2000). I reproduce below s. 18(3) of the IA:

> *Where any matter is of local application only and is issued under the authority of a State officer or any person in the State having authority to do so under federal law it shall constitute sufficient notice thereof if the matter is published in the official Gazette of the State concerned.* (emphasis added); and

(iv) by virtue of the first Limb (O. 53 r. 3(6) of the RC), the three months' period commenced on 14 April 2022 and expired on 14 July 2022. However, the leave application was only filed on 3 August 2022. Hence, the leave application was out of time when it was filed on 3 August 2022.

The appellants should have applied to the High Court pursuant to O. 53 r. 3(7) of the RC for an extension of time to file a judicial review application with regard to the SA's decision (20 November 2000). This was however not done in this case. This is the only reason why I am constrained to dismiss this appeal.

Whether The Appellants Should Have Filed A Private Law Action In This Case

[84] Upon the SA's alienation of parts of the excised land to the fifth to seventh respondents (alienated land), the fifth to seventh respondents had developed parts of the alienated land wherein various third parties had acquired titles or interest (third parties).

[85] I am of the opinion that the appellants should have filed a private law action in this case (instead of a judicial review application). My opinion is premised on the following reasons:

(i) if the court invalidates the SA's decision (20 November 2000), this may nullify the SA's alienation of parts of the excised land to the fifth to seventh respondents. Consequently, the rights and interests of the third parties are adversely affected;

(ii) in a situation which is described in the above sub-para. (i), if a private law action had been instituted by the appellants in this case:

(a) the fifth to seventh respondents could claim an indemnity or contribution (indemnity/contribution) from the SA under O. 16 r. 1(1) of the RC; and/or

(b) to safeguard the third parties' rights and interests:

(1) the third parties can apply to court to intervene in the private law action pursuant to O. 15 r. 6(2)(b)(i) and/or (ii) of the RC; and

(2) once the court allows the third parties to intervene in the private law action as co-defendants, the third parties can then oppose the private law action and claim an indemnity/contribution from the fifth to seventh respondents; and

(iii) unlike a private law action, O. 53 of the RC does not provide for the courses of action as explained in the above sub-paras. (2)(a) and (b).

Conclusion

[86] As explained in the above para. [24], I will dismiss this appeal solely on the ground that the leave application was time-barred pursuant to the first limb (O. 53 r. 3(6) of the RC).

[87] No costs for this appeal were ordered because this appeal concerned matters of public interest regarding "permanent reserved forest".

[88] In closing, I must commend the appellants for their public spiritedness in the institution of this judicial review application and the filing of this appeal. The appellants' learned counsel and solicitors should also be commended for providing *pro bono* legal service in this case. Even though this appeal was not allowed, this appeal has clarified the scope of ss. 11 to 13 of the NFA and the non-application of the proviso (s. 11 of the NFA).